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Brexit and the WTO: What Happens Next

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BREXIT AND THE WTO: WHAT HAPPENS NEXT*

*Andrea Xu***

In the summer of 2016, the United Kingdom (the “UK”) announced its decision to leave the European Union (the “EU”). This decision, more commonly known as “Brexit,” subsequently stirred British politics, which included Theresa May replacing David Cameron as Prime Minister. Brexit created a unique situation in European and global politics, and instigated a discussion among politicians, academics, economists, and the likes about how the UK will leave the EU and Brexit’s implications in the UK, Europe, and the world as a whole.

This Note analyzes one specific aspect of Brexit: the administrative procedures the UK must undergo to establish itself as an independent Member State in the World Trade Organization (“WTO”). This Note solely focuses on the UK’s Schedule of Concessions and considers three possible administrative proceedings that address the UK’s challenges with its Schedule of Concessions. This Note advances the argument that the most realistic administrative proceeding will be for the UK to de facto adopt the EU’s Schedule of Concessions under Article XXVI:5(c) and invoke the UK’s right to reserve to renegotiate certain provisions of its Schedule of Concessions under Article XXVIII of the 1947 General Agreement on Tariffs and Trade (the “GATT”). This procedure will allow the UK greater freedom to choose its own trade policies and draft a Schedule of Concessions in the shortest period, thus mitigating a potentially severe disruption in international trade.

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* This note was written in the Fall of 2016 and does not incorporate several events regarding Brexit that have since occurred.

** J.D. Candidate 2018, University of Michigan Law School. I would like to thank Professor Regan and the editors at the *Michigan Journal of Environmental and Administrative Law* for their input and diligent efforts. I would also like to thank my family and friends for their unwavering support and encouragement. Thank you for always encouraging me to pursue my passions.

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INTRODUCTION

Immediately following Brexit, one of the most important and interesting discussions has involved the consequential impact Brexit will have on the UK’s trade relationships. Some have argued that “the grittiest part of the Brexit negotiations will be over trade.”¹ The international trade community has especially focused on how Brexit has generated a complex situation within the World Trade Organization (“WTO”). The WTO is the only international organization² that governs the rules of international trade³ and decides how the international organization should treat the UK’s WTO Member status. The discussion surrounding the UK and the WTO have primarily focused on the UK’s Schedule of Concessions, which reflects the UK’s specific trade commitments to the WTO and its Member States, and is arguably one of the most important aspects of the WTO.

Given how interdependent the global economy has become, the consequences Brexit will have on the UK’s trade relationships constitutes a global concern. The uncertainty behind the UK’s legal status as a trading nation is undetermined, and such uncertainty can have potentially severe economic consequences for businesses and the price of goods.⁴

1. *Brexit and Trade: Not so Simple*, ECONOMIST (Sept. 15, 2016), <https://www.economist.com/news/britain/21707251-britain-will-not-find-it-easy-strike-comprehensive-trade-deals-quickly-not-so-simple>.

2. An international organization can be defined as an “organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.” Members to an international organization are usually nation states. *International Organizations*, PEACE PALACE LIBR., <https://www.peacepalacelibrary.nl/research-guides/international-organisations-and-relations/international-organizations/> (last visited Nov. 20, 2017).

3. *What is the WTO?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Nov. 20, 2017).

4. Alan Beattie, *Brexit and the WTO Option: Key Questions About a Looming Challenge*, FIN. TIMES (July 12, 2016), <https://www.ft.com/content/5741129a-4510-11e6-b22f-79eb4891c97d>; see also Peter Foster & James Kirkup, *What Will Brexit Mean for British Trade?*, TELEGRAPH (Feb. 24, 2017, 10:21 AM), <http://www.telegraph.co.uk/news/0/what-would-brexit-mean-for-british-trade/> (as an EU member, the UK can export and import goods to and from the EU

This Note focuses on how the WTO should require the UK to create tariff concessions and bindings in its Schedule of Concessions independent of those of the EU, and addresses the challenges the UK may face during this accession process.⁵ Although there has been discussion about the UK's ability to adopt a new Schedule of Concessions under a special procedure of Article XXVI:5(c) of the General Agreement on Tariffs and Trade of 1947 ("GATT"), this Note argues that the UK's access to this special procedure rests on the UK's willingness to adopt the EU's Schedule of Concessions in its exact form. Given the UK leaders' desire to pursue an independent trade agenda and WTO Director-General Roberto Azevêdo's skepticism of that procedure, this simple path may be more precarious.

Section I of this Note introduces the concept of global administrative law, including this legal field's significance in modern society as well as how the WTO fits within this administrative space. Section II provides a very brief overview of Brexit, the WTO, and the EU. Section III focuses on the implications of Brexit and the WTO and touches upon why this novel issue is of importance. Section IV then provides three possible solutions to the UK's Schedule of Concessions within the WTO and proposes two other possible administrative proceedings, other than adopting the procedure of Article XXVI:5 of the GATT, that the WTO can initiate.

As previously mentioned, there may be two other possibilities for the UK to adopt its Schedule of Concessions besides Article XXVI:5 of the GATT. First, the WTO could impose a *de facto* application of GATT Article XXVI:5(c), which would allow the UK to adopt the EU's Schedule of Concessions as is and begin the UK's accession process under GATT Article XXXIII.⁶ Alternatively, the WTO could impose a *de facto* application of GATT Article XXVI:5(c), but rather than beginning the UK's accession process under GATT Article XXXIII, the WTO could allow the UK to reserve its right to renegotiate certain provisions of its Schedule of Concessions under Article XXVIII of the GATT 1947.

and other countries with whom the EU has negotiated a free trade agreement without paying a tariff. Post-Brexit, the UK will have to negotiate new deals to maintain these free trade agreements).

5. For the purposes of this topic, this Note will only focus on tariff concessions and bindings of the UK. A tariff binding is a "commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties." *Glossary Term: Tariff Binding*, WTO, https://www.wto.org/english/thewto_e/glossary_e/tariff_binding_e.htm (last visited Nov. 26, 2017).

6. Accession, for purposes of this Note, refers to the UK independently negotiating the contents of its Schedule of Concessions. Generally, accession is a process in which new WTO Members negotiate their Schedule of Concessions with the existing WTO Member States. *How to Become a Member of the WTO*, WTO, https://www.wto.org/english/thewto_e/acc_e/acces_e.htm (last visited Nov. 20, 2017).

The third option—the UK *de facto* adopting the EU’s Schedule of Concessions and preserving its right to negotiate under Article XXVIII of the GATT—is the UK’s most favorable option and one that the UK should advocate the WTO to permit. Although this procedure is more complex than a simple application of Article XXVI:5(c) of the GATT, it may give the UK more trade independence when renegotiating its Schedule of Concessions.

I. GLOBAL ADMINISTRATIVE LAW IN THE CONTEXT OF BREXIT AND THE WTO

Global administrative law (“GAL”) is a relatively young field of law that reflects the increased globalization of society and “the emergence of a ‘global administrative space:’ a space in which the strict dichotomy between domestic and international has largely broken down.”⁷ In other words, GAL recognizes that many administrative and regulatory functions are now performed on a global rather than national scale, and through a variety of mediums, “ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and to domestic administrative action in the context of global regimes.”⁸ GAL is thus a rather fluid concept, and examples of what this legal field looks like in practice includes World Bank rulemaking for developing countries and the WTO’s governance of each country’s administrative decisions on import tariffs and quotas.⁹

GAL attempts to address the consequences of globalized interdependence in fields such as trade in products and services. Fields such as these can no longer be adequately addressed solely by domestic regulatory and administrative bodies because the production, assembly, and sale of a final product may cross multiple international and domestic borders.¹⁰ One of the challenges GAL thus seeks to solve is domestic officials engaging in global rulemaking and implementing these rules domestically.¹¹ Similarly, domestic regulatory actions can conflict with a treaty or other international obligations.¹²

7. Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 1 (2006).

8. *Id.* at 3.

9. *Id.*

10. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 16 (2005).

11. See Krisch & Kingsbury, *supra* note 7, at 3.

12. See Kingsbury et al., *supra* note 10, at 19.

The WTO falls within the global administrative space by administering trade agreements through a body of lengthy and complex legal text.¹³ Since WTO agreements are negotiated on an international level and implemented on a domestic level, WTO Agreements and the WTO itself blend the international and domestic administrative spheres together: these international agreements both impact and are affected by the domestic countries' political and economic landscapes.

The UK's decision to leave the EU serves as a noteworthy example of this relationship between international and regulatory bodies and illustrates the challenges seen in the global administrative space. Brexit—a domestic referendum—impacts the UK's international obligations as a member of the EU and the WTO. While the UK's withdrawal from the EU may initially have been conducted on a domestic level (or at least, between the EU and the UK), the UK's membership in the WTO has complicated the withdrawal process, creating legal complexity in both domestic and international rulemaking. How the WTO will administratively handle Brexit will thus affect—adversely or not—the domestic economy of the UK and many other Member States.

II. BACKGROUND OF THE UK, THE WHO, AND THE EU

In the summer of 2016, 51.9% of the UK voted to leave the EU.¹⁴ Approximately 71.8% of the population voted in the referendum.¹⁵ Following the referendum, David Cameron resigned from his position as Prime Minister of the UK and was replaced by Theresa May, who served as Cameron's Home Secretary before becoming Prime Minister.¹⁶

The UK's decision to leave the EU—also known as “Brexit”—ignited heated discussion about the UK's status in the WTO, and the implications Brexit may have on the nation's global trade. As stated by Daniel Guéguen, head of strategy and lobbying at Pact European Affairs, “Brexit has now become first and foremost a WTO matter.”¹⁷

It is well accepted that once the UK invokes Article 50 of the Lisbon Treaty¹⁸ and officially leaves the EU, the UK must renegotiate several core

13. See *id.* at 16.

14. Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know about the UK Leaving the EU*, BBC NEWS, <http://www.bbc.com/news/uk-politics-32810887> (last visited Jan. 13, 2018).

15. *Id.*

16. *Id.*

17. Alberto Mucci et al., *Forget Brussels, Brexit's Toughest Battleground is the WTO*, POLITICO (Oct. 6, 2016, 7:53 PM), <http://www.politico.eu/article/forget-brussels-brexit-toughest-battleground-is-the-wto-uk-theresa-may/>.

18. Article 50 of the Treaty on European Union dictates that any Member State of the European Union may withdraw from the European Union. The Treaty also governs how the

aspects of its WTO rights and obligations, specifically its Schedule of Concessions. What is particularly challenging for the UK's WTO status is the fact that while the UK is a WTO Member in its individual capacity (and thus is not required to go through a formal accession process), its Schedule of Concessions is fixed by its EU membership. The UK's situation is unprecedented in the history of the WTO, and the question of how to proceed has generated much discussion among politicians, lawyers, and academics.¹⁹

To understand the complicated situation Brexit has created within the WTO, it is important to first understand the historical background of the WTO. The UK is a WTO Member and was also a GATT Member, an agreement that preceded the WTO's founding in 1995.²⁰ The GATT was signed in 1947 during a broader course of negotiations that tried (and failed) to establish the International Trade Organization. From 1948 to the beginning of the WTO, the GATT was the principal international agreement regulating trade between nations. The GATT helped establish a strong foundation for a multilateral trading system, but the system's shortcomings eventually led way to the WTO after the Uruguay Round, which were negotiations that took place from 1986 to 1994.²¹ Although the WTO has replaced the GATT, the General Agreement is included as part of the WTO Agreement for trade in goods and serves as the WTO Agreement's most substantial body of text.²²

The WTO is an international organization comprised of countries serving as Member States. The WTO is "the only global international organization dealing with the rules of trade between nations."²³ Broadly speaking, the organization aims to reduce tariffs and other trade barriers by serving as "a forum for governments to negotiate trade agreements . . . settle trade

Member State can withdraw from the European Union. Consolidated Version of the Treaty on European Union art. 50, May 9, 2008, 2008 O.J. (C 115) 43-44.

19. See, e.g., Lorand Bartels, *The UK's Status in the WTO after Brexit*, SSRN, Sept. 23, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747; Peter Ungphakorn, *Nothing Simple About UK Regaining WTO Status Post-Brexit*, INT'L CTR FOR TRADE & SUSTAINABLE DEV., June 27, 2016, <http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit>; C.W., *Why the "WTO Option" for Brexit Will Prove Tricky*, ECONOMIST, Jan. 9, 2017, <http://www.economist.com/blogs/economist-explains/2017/01/economist-explains-4>.

20. *United Kingdom and the WTO*, WTO, http://www.wto.org/english/thewto_e/countries_e/united_kingdom_e.htm (last visited Dec. 1, 2017).

21. William Davey, *The World Trade Organization: A Brief Introduction*, in INTERNATIONAL TRADE LAW 87, 87-90 (Rachel E. Barkow et al. eds., 3d ed. 2016).

22. See *Understanding the WTO: Basics - The Uruguay Round*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Nov. 21, 2017); see also Joost H.B. Pauwelyn et al., *Agreement Establishing the World Trade Organization*, in INTERNATIONAL TRADE LAW 102, 102 (Rachel E. Barkow et al. eds., 3d ed. 2016).

23. *What Is the WTO?*, *supra* note 3.

disputes. . . [and] operate a system of trade rules.”²⁴ The WTO’s core lies in the WTO Agreements, which are agreements negotiated and signed by the majority of the world’s trading nations and ratified in those nations’ parliaments.²⁵ Since the WTO aims to be a member-driven organization, Member States make collective decisions that the WTO acts on when the Member States reach a general agreement.²⁶ The WTO was born out of negotiations. Thus, all WTO actions result from negotiations, including the WTO Schedule of Concessions.²⁷

The WTO Schedule of Concessions reflects “specific tariff concessions and other commitments that [individual Member governments] have given in the context of trade negotiations, such as the Uruguay Round.”²⁸ All WTO Members must agree upon the Schedule of Concessions, and each Member must keep its applied tariff rates at or below the agreed-upon rate.²⁹ States can agree to modify their Schedules through negotiations under GATT Article XXVIII.³⁰

The EU has been a WTO Member since January 1, 1995 and is a single customs union with a single trade policy and tariff. What is unique about the EU within the WTO is that while its twenty-eight Member States are individually WTO Members, the European Commission—the executive body of the EU—negotiates on behalf of all EU Member States at almost all WTO meetings.³¹

The UK is a Member State of the EU and, as previously mentioned, has been a GATT Member since January 1, 1948. As a member of the EU,

24. *Who We Are*, WTO, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Nov. 21, 2017).

25. *Id.*

26. *Id.*

27. *See Understanding the WTO: Basics - What Is the World Trade Organization?*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Nov. 21, 2017).

28. *Goods Schedules: Members’ Commitments*, WTO, https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited Jan. 3, 2018).

29. *See Pauwelyn et al., supra* note 22, at 182. Although the WTO aims for increased trade liberalization, the WTO does not prohibit tariffs. Tariffs, in the simplest sense, are fees that a company pays to export its goods abroad and gain access to a specific foreign country’s market. *See id.* Tariffs are imposed on merchandise imports and give a price advantage to locally-produced goods over similar goods that are imported. *Tariffs*, WTO, https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm (last visited Nov. 21, 2017). Tariffs also help raise revenue for the government. *Id.*

30. *Goods Schedule: Members’ Commitments, supra* note 28.

31. *Member Information: The European Union and the WTO*, WTO, https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last visited Jan. 3, 2018).

the UK has also been a WTO Member since January 1, 1995 in accordance with Article XI:1³² of the WTO Agreement.³³

Although the UK lacks full autonomy in the WTO, its rights and obligations as a WTO Member State are still the same as those of any other WTO Member. This understanding was reinforced in *EC/Certain-MS Airbus*. In *EC/Certain-MS Airbus*, the WTO Panel³⁴ rejected the EU's request to remove five Member States, including the UK, as respondents and to leave the EU as the sole respondent.³⁵ In rejecting the EU's request, the Panel stated that "[e]ach of these five [Member States] is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO Member."³⁶ The UK's unique position as a WTO Member and as a Member State represented by the European Union thus complicates the WTO's efforts to disentangle the UK from the EU both substantively and administratively.

32. Article XI:1 of the WTO Agreement states:

The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

Marrakesh Agreement Establishing the World Trade Organization art. XI:1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. In short, Article XI:1 simply allows those who were members of the GATT to automatically become members to the WTO.

33. *Member Information: The European Union and the WTO*, *supra* note 31; see also Bartels, *supra* note 19, at 3.

34. WTO panels are quasi-judicial bodies that are the first to hear and adjudicate trade disputes between WTO Members. A WTO panel is normally comprised of three experts selected on an ad hoc basis. The Panel must review the factual and legal components of the case it is reviewing and submit a report to the Dispute Settlement Body ("DSB"), the WTO branch in charge of dispute settlements, that expresses the Panel's conclusions and recommendation for implementation by the respondent. *WTO Bodies Involved in the Dispute Settlement*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm (last visited Nov. 21, 2017). The WTO also has an Appellate Body, which is a standing body of seven people. A WTO Member can appeal the report it received from the Panel regarding its dispute, and the Appellate Body can "uphold, modify, or reverse the legal findings and conclusions of a panel." The Appellate Body also issues a report after hearing a specific dispute, and the report must be accepted by the disputed parties once the DSB adopts the Appellate Body Report. *Dispute Settlement: Appellate Body*, WTO, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Nov. 21, 2017).

35. Panel Report, *European Communities and Certain Member States: Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/R (adopted June 1, 2001).

36. *Id.* at 321.

III. THE IMPLICATIONS OF BREXIT AND THE WTO: THE CONCERNS

The UK's access to the EU's single market is one of the most beneficial features of EU membership. Goods, people, services, and capital circulate freely among Member States.³⁷ After Brexit, however, the UK will no longer have immediate access to the EU's single market and must negotiate all its trade relationships.³⁸ Currently, the UK has preferential trade agreements with the EU and with fifty-eight countries as an EU member state.³⁹ Leaving the EU will naturally force the UK to renegotiate these prior trade agreements.⁴⁰ The UK will also likely encounter tariff and non-tariff barriers in accessing the EU market, and the increase in cost for the UK to trade with the same markets will damage the competitiveness of UK companies. WTO Director-General Roberto Azêvedo predicts that UK exporters may have to pay up to £5.6 billion each year in duty on their exports,⁴¹ and the services trade⁴² will also be significantly affected.⁴³

Moreover, certain rights will no longer apply to the UK, and the UK may need to renegotiate with other WTO Members to maintain these rights. The EU's guarantees of free movement of people and of protecting public utilities from competition may no longer be safeguarded in the UK.⁴⁴

37. *What is the Common Customs Tariff?*, EUR. COMMISSION, https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff_en (last visited Nov. 21, 2017).

38. See, e.g., Shehab Khan, *Britain Will Not Have Same Access to Single Market After Brexit, Top Tory in Brussels Admits*, INDEPENDENT (Aug. 5, 2017, 5:02 PM), <http://www.independent.co.uk/news/uk/politics/europe-not-allow-britain-better-position-brexit-leader-conservative-party-at-european-parliament-a7833906.html>.

39. Roberto Azêvedo, WTO, *Azêvedo Addresses World Trade Symposium in London on the State of Global Trade* (June 7, 2016), https://www.wto.org/english/news_e/spra_e/spra126_e.htm.

40. *Id.*

41. *Id.*

42. This Note defines "services trade" as analogous to services covered in the WTO's General Agreement on Trade in Services ("GATS"). Although this Note only focuses on trade in goods, it is worth noting that the UK's renegotiations in the WTO will also include its trade in services encompassed within the GATS. The GATS is "the only set of multilateral rules covering international trade in services" and "reflects the gradual transfer of responsibility for many services from government-owned suppliers to the private sector and the increased potential for trade in services brought about by advances in information and communication technology." The GATS categorizes trade in services into four modes, and services that fall within the GATS include business and professional services such as legal and computer services, tourism services, educational services, environmental services, and financial services. *Trade in Services*, WTO, 1, 3-4, https://www.wto.org/english/thewto_e/20y_e/services_brochure2015_e.pdf (last visited Nov. 21, 2017).

43. *Id.*

44. *Id.*

Losing the right of free movement is especially troublesome because the UK is the world's third largest exporter of services.⁴⁵ The UK attracts significant overseas investment from major foreign firms that hope to use the UK, particularly London, as a base to enter the European markets.⁴⁶ If the UK can no longer guarantee the free movement of people from London to other major European cities, these firms may be incentivized to move their European headquarters from London to another European city, such as Milan or Paris, where free movement is ensured.⁴⁷ Thus, while many British citizens supported Brexit partially because of angst over increased immigration resulting from free movement policies, many may have failed to account for the free movement's corresponding economic and business benefits.

Brexit will also have trade implications outside of the UK's relationship with the EU. For instance, as Director-General Azêvedo claims, the UK will need to "re-establish its terms of trade within the WTO."⁴⁸ There are several challenges behind this endeavor, primarily that the UK does not have defined terms in the WTO for its trade in goods and services. Director-General Azêvedo has warned that "it would be impossible for the UK to 'cut and paste' its old EU deals into new agreements," although Director-General Azêvedo has failed to explain precisely why the UK could not follow a "cut and paste" method.⁴⁹ Instead, Director-General Azêvedo has warned that the UK would be "starting from scratch without the institutional machinery necessary to negotiate trade deals."⁵⁰

If the UK needs to start negotiations from the very beginning, the country will most likely forfeit its previous advantageous position of being part of the larger EU market. Moreover, it is doubtful that the UK can get as favorable of an agreement with other countries as when the UK was an EU Member. For example, the UK will most likely not benefit from the free trade agreements the EU has negotiated with Korea, Chile, Mexico,

45. Beattie, *supra* note 4.

46. See SWATI DHINGRA ET AL., CTR. FOR ECON. PERFORMANCE, THE IMPACT OF BREXIT ON FOREIGN INVESTMENT IN THE UK 2 (Apr. 2016), <http://cep.lse.ac.uk/pubs/download/brexit03.pdf> (listing reasons why foreign direct investment might fall if the UK left the EU).

47. ANDREW LANG, LSE LAW, THE CONSEQUENCES OF BREXIT: SOME COMPLICATIONS FROM INTERNATIONAL LAW 2 (June 2014), http://eprints.lse.ac.uk/64046/1/Policy%20briefing%203_2014.pdf.

48. Azêvedo, *supra* note 39.

49. Larry Elliot, *WTO Chief Says Post-Brexit Talks Must Start from Scratch*, GUARDIAN, June 7, 2016, 7:37 AM, <https://www.theguardian.com/business/2016/jun/07/wto-chief-brexit-trade-talks-start-scratch-eu-referendum>.

50. *Id.*

and South Africa.⁵¹ In short, the UK's bargaining power may suffer from its inability to freely access the EU and its market.

Even if the UK can "cut and paste" the UK's old EU deals into new agreements, most of the EU's current commitments in the WTO are unknown. The only confirmed commitments on tariffs, quotas, and farm subsidies are from before 2004, when the EU only had 15 Member States.⁵² While the EU has expanded three times since 2004, it has yet to agree with the WTO membership on revised commitments.⁵³ For instance, the EU limited its spending on agricultural subsidies to €6.72 billion in its pre-2004 commitment. However, the EU reported a limit of €72.4 billion to the WTO on its subsidies, potentially from a draft that has yet to be agreed to by the WTO's membership.⁵⁴ The UK will therefore be negotiating a share of key quantities that are unknown or have yet to be agreed to by the WTO membership.⁵⁵

Lastly, the sheer amount of work and time the UK will expend to re-negotiate its terms of trade in the WTO will also be challenging. The EU (and UK) has approximately 20,000 products listed for collecting customs duties, thousands of product standards regulations, and extremely complicated limits on access to its services market.⁵⁶ Since the WTO operates by consensus, only one country needs to object to stall negotiations. Considering negotiations involving only an adjustment of Members' existing terms in their Schedule takes years to complete, it is impossible to estimate how long it may take for the UK to finalize its own Schedule.⁵⁷

In addition to the significant time delay, Maika Oshikawa, Counsellor of the WTO's Accessions Division, has indicated that the UK will likely need to garner political consensus for its new Schedule of Concessions among the 163-plus WTO Members.⁵⁸ The prospect of successfully conducting negotiations with this many WTO Members is dim, especially given that recent negotiations have revealed WTO Members' unwillingness to accommodate each other's trade interests.⁵⁹ Reaching a final agreement will be tedious and not guaranteed.

How and what the UK can do to establish itself as an independent Member is thus a crucial question that must be resolved. The most

51. LANG, *supra* note 47, at 2.

52. Ungphakorn, *supra* note 19.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Azêvedo, *supra* note 39.

58. Mucci, *supra* note 17.

59. Ungphakorn, *supra* note 19.

straightforward process, disregarding Director-General Azêvedo's previous statements, is for the UK to copy the EU's Schedule of Concessions. But even this process contains challenges.

First, because decision-making within the WTO operates on consensus, any WTO Member that objects to the UK's Schedule of Concessions would prevent the UK's Schedule from being approved. For the reasons noted above, an objection is a nearly certain likelihood.

Secondly, not every sector can be exactly adopted. While the UK likely can adopt the import tariffs set by the EU for industrial goods, such as shoes and clothing, agriculture poses a more difficult problem given the political sensitivity and logistical complications surrounding that sector.⁶⁰ In addition to straightforward tariffs, each country's agricultural WTO commitment contains "tariff-rate quotas," which allow a certain amount of produce to enter at lower duties.⁶¹ Since quotas are divided and allotted to exporters by country, the EU and UK will not only have to conduct their own negotiations to redistribute the quota, but the UK will also have to negotiate with the other WTO Members to establish the UK's quota with each country.⁶²

For the UK's services sector, Hosuk Lee-Makiyama, Director of the European Centre for International Political Economy and a former EU Trade Negotiator, believes that while theoretically it will not be difficult to create a services schedule for the UK out of the EU's Schedule, it will be an "excruciating legal process."⁶³ Time will be a significant detriment to the UK, especially given the substantially larger role the services sector plays in the UK's economy.⁶⁴ For instance, the EU services schedule did not incorporate Bulgaria and Romania until five years after they joined the EU.⁶⁵ If the UK were to act on a similar timeline, its services sector could be severely disrupted. As previously mentioned, the UK has been attractive because of its connection to the free movement and people of the EU. Losing this component may deter further foreign investment.

There is also a question of how the services sector would operate within the international trade regime without a concrete schedule of services. Such turbulence could lead the country to a potential economic recession.

The UK's decision to leave the EU poses challenges with significant consequences that will affect the UK's relationship with the EU and the

60. Beattie, *supra* note 4.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* (stating that the UK is the world's third-largest exporter of services).

65. *Id.*

WTO. Despite speculations and predictions about the sheer amount of negotiations the UK must engage in following its official secession from the EU, the UK and the WTO face the most important question that remains: exactly what sort of accession will the WTO require from the UK to exercise its full status as a WTO Member.

IV. WHAT UK'S ACCESSION TO THE WTO MAY LOOK LIKE

The following proposals are three possible administrative proceedings the WTO can use to address the UK's missing Schedule of Concessions and its unique position in the international organization. Each proposal presents its own administrative challenges, and none of these proposals offers a perfect solution. Moreover, the complexity and challenges within these three proposals reflect the complexities of global administrative law overall, and the challenges international organizations, such as the WTO, face when dealing in a space that involves domestic and international players.

The third proposal—*de facto* application of Article XXVI:5(c) and tariff modifications under Article XXVIII of the GATT 1947—may be the most ideal and realistic proposal. This proposal addresses the WTO's administrative challenges in dealing with this unprecedented situation and provides the UK with the necessary flexibility to create and adopt its own trade policy distinct from the EU's trade policy.

A. *Proposal #1: Adopting a Schedule of Concessions under Article XXVI:5(c) of the GATT 1947*

Although there has been much discussion about the implications of Brexit and the challenges behind the UK's ability to re-establish its terms of trade in the WTO, there has been minimal discussion as to the exact procedure the UK must undergo to rectify and modify its Schedule of Concessions. Lorand Bartels, law professor at the University of Cambridge, offers one proposal for the UK's unprecedented situation: to allow the UK to cre-

ate its Schedule of Concessions, the WTO should proceed in accordance to Article XXVI:5(c)⁶⁶ of the GATT 1947.⁶⁷

Article XXVI:5(c) permits newly autonomous customs territories, which historically have been former colonial territories, to succeed to GATT contracting party status upon the request and sponsorship of the formerly responsible GATT contracting party.⁶⁸ Following succession, the newly independent territory inherits all the rights and obligations previously in place when the territory was still a colony, including the Schedule of Concessions of its former governing State.⁶⁹ Submitting new GATT 1947 Schedules in this context is recognized as other "changes," except when the Schedule requires an increase in duties beyond the bound tariff rate.⁷⁰

To implement Article XXVI:5(c), the UK's Schedule of Concessions would be annexed to the GATT 1994 and the GATS. The 1980 Decision on Procedures for Modification and Rectification of Schedule of Tariff Concessions (the "1980 Decision") is binding as part of the GATT 1994 and governs the current procedure for making changes to GATT 1994 and the GATS.⁷¹ The 1980 Decision is particularly relevant to Article XXVI:5(c) because of paragraph five of the 1980 Decision, which explicitly states that "the procedure of Certification under this Decision may be applied for the establishment of consolidated Schedules or of new Schedules under paragraph 5(c) of Article XXVI, wherein all changes are modifications or rectifications referred to in paragraphs 1 or 2."⁷²

The fact that the 1980 Decision distinguishes between "changes" and "modifications" is significant. Paragraph one of the 1980 Decision explains that "modifications" must be certified by means of Certification. Conversely, paragraph two of the 1980 Decision explains that "changes" are

66. Article XXVI:5(c), entitled "Acceptance, Entry into Force and Registration," reads:

(c) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

WTO, *Article XXVI – Acceptance, Entry into Force and Registration*, in 2 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 908 (Bernan eds., 6th ed. 1995) [hereinafter ANALYTICAL INDEX GATT VOL 2].

67. See generally Bartels, *supra* note 19.

68. *Id.* at 16.

69. *Id.*

70. *Id.*

71. *Id.* at 13.

72. *Procedures for Modification and Rectification of Schedules of Tariff Concessions*, GATT Doc. L/4962 ¶ 4 (Mar. 28, 1980) [hereinafter the 1980 Decision].

more of a formality and shall be made by means of Certification, not certified by means of Certification as detailed in paragraph one.⁷³

From Bartels' perspective, "modifications" under paragraph one are concerned with modifications that negatively affect concessions while "changes" under paragraph two are simply neutral changes that do not alter the scope of the Schedule of Concessions.⁷⁴ Whether an alteration is considered a "modification" or a "change" affects the procedural nature of the alteration. Objections to "modifications" reflected in paragraph one lead to arbitration to determine appropriate compensation whereas objections to "changes" reflected in paragraph two only initially lead to revised versions of non-altering modifications.⁷⁵ The fact that the 1980 Decision recognizes the adoption of a new GATT 1947 Schedule of Concessions under Article XXVI:5(c) thus simplifies the accession process for newly independent territories and limits the ability for current WTO Members to object to the State's Schedule of Concessions and its accession to the WTO.

Bartels advocates for the WTO to follow a similar procedure, arguing that while Article XXVI:5(c) is no longer operative,⁷⁶ the WTO could still refer to this specific provision as a guiding source in annexing the UK's Schedule of Concessions.⁷⁷ Bartels suggests that the UK's departure from the EU parallels the circumstances of those territories that traditionally fell under Article XXVI:5(c).⁷⁸ Both cases concern the acquisition by a customs territory of full autonomy in matters covered by the GATT 1947 or WTO, and both need to adopt a Schedule of Concessions.⁷⁹ Using Article XXVI:5(c) as guidance, Bartels suggests that the UK should submit new Schedules under Article II of the GATT 1994 and Article XX of the GATS as "other changes" and rectifications to the current EU Schedule with respect to itself and its territory.⁸⁰ If the WTO were to accept the UK's Schedule of Concessions submission as a "change," other WTO Members would have limited grounds for objection.⁸¹ This would thereby provide the UK with an avenue that could potentially speed up its quasi-accession process and minimize the economic damage the UK may suffer while unprotected from rising tariff and non-tariff barriers.

73. *Id.*

74. *See* Bartels, *supra* note 19, at 13-14.

75. *Id.* at 14.

76. Despite this suggestion, Bartels offers no support to explain why Article XXVI:5(c) is no longer operative.

77. Bartels, *supra* note 19, at 17.

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.*

Although Bartels' proposal is appealing, it is vulnerable to criticism. First, the likelihood of the WTO adopting this interpretation is debatable, and Director-General Azêvedo's warning about the UK's inability to "cut and paste" the EU's Schedule suggests hostility to Bartels' plan. Moreover, as previously explained, the UK must disentangle itself from the EU's tariff Schedule and quota restrictions. This disentanglement would count as a modification to both the UK and EU's Schedule because the scope of the UK and EU's Schedules of Concessions will be altered. The UK will need to independently adopt its own Schedule and since the EU's tariff schedule and quota restrictions include the UK, the EU will need to adjust its Schedule (e.g. reduce its quota restrictions) to account for the UK no longer being an EU Member-State. This action would trigger Article XXVIII of GATT 1947, which requires new agreements and negotiations with other WTO Members.⁸²

The biggest weakness in Bartels' argument is Article XXVI:5(c) itself. Even if the WTO could procedurally allow the UK to adopt a Schedule of Concessions through a process similar to Article XXVI:5(c), Bartels' argument rests on a shaky assumption that the UK will want to permanently adopt the EU's Schedule in its exact form.⁸³ Yet, the UK has hinted at its desire to become a free-trade country.⁸⁴ This preference for increased trade liberalization undermines the idea that the UK would adopt the EU's Schedule of Concessions, making it difficult for the UK to encourage the WTO to follow Bartels' proposal.⁸⁵

82. LANG, *supra* note 47, at 3.

83. The fact that the UK would have to adopt the same Schedule of Concessions as the EU is further supported by the report of the Working Party on "Article XXXV – Application to Japan," which pointed out "that there could be no doubt that a government becoming a contracting party under Article XXVI:5(c) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question." ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 921.

84. See Liam Fox, *Speech Delivered by International Trade Secretary Liam Fox at the Manchester Town Hall* (Sept. 29, 2016), <https://www.gov.uk/government/speeches/liam-foxs-free-trade-speech> (speaking how "free and fair trade is fundamental to the prosperity of the United Kingdom and the world economy"); see also Liam Fox, *International Trade Secretary's Speech at the AEI During His U.S. Visit for the First Meeting of the UK-US Trade and Investment Working Group* (July 24, 2017), <https://www.gov.uk/government/speeches/liam-fox-champions-global-free-trade> (speaking generally to the fact that "if nations are allowed to engage in free and open trade . . . then there is a mutual increase in economic welfare between nations, making those countries richer as a result.").

85. See Fox, *Speech Delivered by International Trade Secretary Liam Fox at the Manchester Town Hall*, *supra* note 84; see also Rowena Mason, *Liam Fox Looks to WTO in Hint at 'Hard Brexit' Stance*, GUARDIAN (Sept. 29, 2016, 8:17 AM), <https://www.theguardian.com/politics/2016/sep/29/liam-fox-looks-to-wto-in-hint-at-hard-brexit-stance>.

Of course, the UK could adopt the EU's Schedule while maintaining its stance on free-trade. Since a Schedule of Concessions focuses only on the bound tariff rate, the UK could impose a nominal tariff rate on its goods, or even no tariff rate at all to reflect its policy of free-trade. One would be hard-pressed to find countries who would be opposed to more liberalized trade borders, and such a tactic would still preserve the appeal behind Bartels' proposal of allowing the UK to undergo an accession process modeled after Article XXVI:5(c).

Even this strategy, however, contains weaknesses that may undermine Bartels' plan. As previously noted, the EU's commitments to the WTO are still murky. The UK would first have to undergo a series of negotiations with the EU and a WTO working group to first determine (1) what are the EU's specific commitments and (2) how much the EU's agricultural subsidies and tariff quotas will need to be reduced in its Schedule to account for the EU's smaller footprint without the UK. This procedure could take months, if not years, and this delay undermines Bartels's argument that the Article XXVI:5(c) process is an expedited and simplified method for the UK to adopt its Schedule of Concessions.

Despite Bartels' claim, the UK's unique situation also may not be analogous to those cases that fell under Article XXVI:5(c) for three reasons. First, unlike the countries that invoked the accession process under Article XXVI:5(c), the UK is not a former colony. This legal status is a crucial difference. British laws are independent from EU laws, and because certain legislation intertwines EU and British law, the accession process is not as clean as Bartels suggests.⁸⁶ Second, Article XXVI:5(c)'s purpose was to establish a right of succession to contracting party status.⁸⁷ The UK's status as a full WTO Member undermines the country's legitimate use of a procedure for former colonies.

Lastly, the UK's political climate may reject a proposal in which the UK permanently adopts the EU's Schedule of Concessions. Following the outcome of the June referendum, one could assume that British citizens want to disassociate from the EU. Adopting the EU's Schedule of Concessions may stir backlash. Indeed, as suggested by one newspaper, adopting the EU's Schedule of Concessions "makes a mockery of everything Brexit stands for."⁸⁸

86. Ian Dunt, *Twenty Reasons Why Brexit Will Be Even Trickier Than We Thought*, GUARDIAN (Dec. 6, 2016, 11:19 AM), <https://www.theguardian.com/politics/2016/dec/06/twenty-reasons-brexit-trickier-than-we-thought>.

87. Bartels, *supra* note 19, at 17.

88. Dunt, *supra* note 86.

B. Proposal #2: De Facto Application of GATT Article XXVI:5(c) and Accession under GATT Article XXXIII

One alternative to Bartels' proposal is *de facto* application of GATT Article XXVI:5(c) and accession under GATT Article XXXIII ("Accession").⁸⁹ The purpose of *de facto* application of Article XXVI:5(c) is "to provide some time for governments of newly-independent territories to consider their future commercial policy and the question of their relations with the General Agreement, while continuing the pre-existing arrangements governing the trade relations between the newly-independent country and the contracting parties to the GATT."⁹⁰ Administratively, the Recommendation of November 1, 1957 on "Procedures for Sponsorship under Article XXVI:5(c)" states that the responsible contracting party should notify the Secretariat of the WTO when the newly autonomous territory becomes fully independent in its external commercial relations.⁹¹ The Contracting Parties will then set a "reasonable time" period under which the territory in question will continue with *de facto* application of Article XXVI:5(c).⁹²

Countries such as Cambodia used this procedure despite their eligibility under Article XXVI:5(c) because Cambodia did not want to accept the terms and conditions of their previous governments, including any applicable Schedule of Concessions.⁹³ Cambodia requested accession under Article XXXIII, not Article XXVI:5(c), to avoid assuming the former Schedule of Concessions of France for Indo-China, believing that doing so was in their best interest.⁹⁴ According to the Royal Government of Cambodia, Cambodia's trade represented only part of the Indo-Chinese trade, and "the Sched-

89. In full, Article XXXIII, "Accession," states:

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

ANALYTICAL INDEX GATT VOL. 2, *supra* note 66, at 1017.

90. *Id.* at 921.

91. *Id.* (citing Recommendation of Nov. 1, 1957 on Procedures for Sponsorship under Article XXVI:5(c)).

92. *Id.* at 921-22 (noting, however, that the Recommendation of Nov. 11, 1967 on "Application of the General Agreement to Territories which acquire Autonomy in Commercial Matters" agreement never set forth a specific time period to be considered "reasonable.").

93. *See id.* at 1025.

94. *See id.* at 1025 n.45.

ules which have been negotiated on the basis of such trade represent at present a very heavy burden.”⁹⁵

Similarly, the UK can adopt this procedure given its eligibility under the second half of Article XXXIII as “a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and other matter provided for in this Agreement,” who thus “may accede to this Agreement, on its behalf of behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES.”⁹⁶

It should be noted that Article XII of the Marrakesh Agreement⁹⁷ (“Accession”) governs current accession procedures to the WTO. While Article XII’s language differs from Article XXXIII’s language, the overall concept behind both accession provisions are consistent, and the UK would be eligible for succession under Article XII:1.⁹⁸ Thus, once the UK invokes *de facto* application of Article XXVI:5(c), the UK would begin its accession under Article XII.

Accession under Article XII presumably follows a similar protocol to Article XXXIII.⁹⁹ The UK will notify the Secretariat of the country’s desire to negotiate with other Members to enter the Marrakesh Agreement and provide written answers to all of the WTO Members’ questions.¹⁰⁰ The UK will then negotiate its Schedule of Concessions with other Members who wish to participate.¹⁰¹ Once tariff negotiations conclude, the Schedule will be annexed to the draft Protocol of Accessions and submitted to the General Council for adoption of the report of the accession working party and approval of the Protocol of Accession. Following this step, the Ministerial Conference will then conduct a vote to approve the accession, which requires a two-thirds majority vote from the WTO Members.¹⁰²

95. *Accession of Cambodia: Statement by the Representative of the Royal Government of Cambodia at a Meeting of the CONTRACTING PARTIES on 30 October 1958*, GATT Doc. L/900 1 (Nov. 1, 1958), https://www.wto.org/gatt_docs/English/SULPDF/90720012.pdf.

96. ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 1017.

97. The Marrakesh Agreement established the WTO. Marrakesh Agreement, *supra* note 32, at 155.

98. The relevant provision of Article XII:1 states: “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO.” *Id.* art. XII:1.

99. Article XII does not seem to have explanatory notes like the GATT.

100. *See generally* ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 1019.

101. *Id.* (“Accession tariff negotiations are held between the acceding government and those contracting parties to the GATT which wish to participate therein, in parallel with the working party.”).

102. ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 1019; *see also* Marrakesh Agreement, *supra* note 32, art. XII:2.

There are, of course, challenges to this specific procedure. As with all the proposals this paper introduces, time will be an issue. One must assume that the WTO will not allow for a *de facto* application of Article XXVI:5(c) until the UK triggers Article 50 of Lisbon Treaty to secede from the EU, or even until the UK has officially and completely seceded from the EU.

Prime Minister May has announced that she will trigger Article 50 in March of 2017,¹⁰³ which gives the UK two years to negotiate its withdrawal. Thus, the WTO may allow for a *de facto* application of Article XXVI:5(c) as early as March of 2017 or as late as March of 2019.¹⁰⁴ If the WTO does not allow for *de facto* application until March 2019, whether the UK is able to continue to trade under the EU's Schedule of Concessions is subject to debate, and perhaps contingent on secession negotiations between the UK and EU under Article 50. Once Article XXVI:5(c) is *de facto* applied, accession tariff negotiations under Article XII will likely take at least several months. The bureaucracy behind drafting the necessary documents may significantly slow down the accession process. How quickly negotiations will be conducted will depend on how many WTO Members choose to ask questions and participate in the negotiations, and how willing these countries will be to compromise with the UK in its tariff negotiations. Since the UK is a powerful and wealthy country, many will most likely choose to participate. The UK thus faces the daunting tasks of securing the support of approximately 109 countries to reach the necessary two-third's majority vote.¹⁰⁵

Additionally, the WTO Members, including the EU, may oppose a *de facto* application of Article XXVI:5(c). While the Members have never defined the meaning of *de facto* application, previous practices suggest that a *de facto* application will give the UK broad discretion over what the country does not have to do.¹⁰⁶ For instance, the UK will neither have to notify any

103. Theresa May: *Brexit Plans to Be Laid out in New Year*, BBC NEWS (Dec. 20, 2016), <http://www.bbc.com/news/uk-politics-38383216>.

104. See Caroline Mortimer, *Brexit: What is Article 50 and How Long Will It Take for Britain to Leave the EU?*, INDEPENDENT (Oct. 2, 2016, 5:11 PM), <http://www.independent.co.uk/news/uk/politics/article-50-what-is-brexit-how-long-britain-leave-eu-referendum-theresa-may-latest-a7341691.html> (Theresa May triggered Article 50 in March 2017. From March 2017, the UK has "exactly two years to negotiate a new settlement before it has to leave [the EU]."). See also, Hunt & Wheeler, *supra* note 14.

105. There are 164 WTO Members as of July 29, 2016. To reach the two-third's majority vote, the UK will need to secure the support of approximately 109 WTO Members. See generally *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 21, 2017). See also Marrakesh Agreement, *supra* note 32, Art. XII:2.

106. ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 923. (Noting that although the "Contracting Parties have never defined the meaning of *de facto* application," there were

modifications of their tariff Schedules under Article XXVIII nor notify the GATT, or consult the GATT Balance-of-Payments Committee under Article XVIII:B if the UK imposes import restrictions for balance of payment purposes.¹⁰⁷ Given the UK's economic and political status, one may reasonably presume that WTO Members will greatly resist these flexible provisions for the UK.

What further complicates this proposal is the UK already being a WTO Member. To have the WTO invoke Article XII as a means for the UK to negotiate and adopt its own tariff Schedule may be seen as an illegitimate workaround to the provisions.

Nevertheless, this proposal may still be a realistic possibility that the WTO may consider when dealing with this novel issue. The UK's status as a powerful and wealthy nation still provides the country with some bargaining power, and smaller countries in the WTO may depend on the UK for certain goods. Moreover, the EU may also have to re-negotiate its own Schedule of Concessions because the UK's secession will affect the proportion of its tariff quotas and the like. Should the EU also have to enter negotiations, the UK will have leverage in the form of threatened objections over the EU to garner favorable terms for its own Schedule. If the UK can obtain a notable level of bargaining power, following this procedure will allow the UK to mitigate potential and serious adverse trade effects Brexit may impose on the British economy and the UK's trading partners. Adhering to the procedure may also provide some flexibility for the country to formulate its own trade agenda.

C. *Proposal #3: De Facto Application of Article XXVI:5(c) and Tariff Modifications under Article XXVIII of the GATT 1947*

The third, and perhaps most realistic proposal, is to still apply a *de facto* application of Article XXVI:5(c). However, instead of the UK adopting its Schedule of Concessions under an Article XII accession process, the UK could adopt its Schedule Concessions as a tariff modification under Article XXVIII of the GATT 1947 ("Modification of Schedules"), specifically Article XXVIII:5.¹⁰⁸ Article XXVIII:5 allows a country to "reserve the right,

certain practices that had evolved "in regard to this form of association with the General Agreement.").

107. *Id.*

108. Article XXVIII:5 states:

"Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate

for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3” of Article XXVIII with each duration lasting for a three-year period.¹⁰⁹ Through this approach, the UK can assume the EU’s Schedule of Concessions under Article XXVI:5(c) while also invoking Article XXVIII:5 to allow the country to change certain parts of the Schedule of Concessions. Only those changed provisions would undergo modification and tariff renegotiations. As with the second proposal, following this approach may maintain trade stability while providing the UK flexibility in setting its own trade agenda.

This model has been used by previous countries acceding to the WTO, most notably, Bangladesh. Following its independence from Pakistan, Bangladesh requested accession to GATT under Article XXXIII in 1972.¹¹⁰ According to several Contracting Parties, however, the normal procedure under Article XXXIII, which included the creation of a working party and full negotiations with the Contracting Parties to create a new Schedule, seemed inappropriate in Bangladesh’s situation.¹¹¹ Bangladesh continued to apply the GATT in its trade relationships and was prepared to take over all of Pakistan’s obligations—including Pakistan’s tariff concessions—so long as Bangladesh could reserve its right under Article XXVIII:5 to modify its Schedule of Concessions for the next three years following its accession to the GATT and the WTO.¹¹² Indeed, Bangladesh itself believed that the current provisions of the General Agreement did not adequately address its unique situation.¹¹³ As a result of Bangladesh’s situation, particularly Bangladesh’s willingness to adopt Pakistan’s Schedule of Concessions subject to the ability to invoke Article XXVIII:5, a number of Contracting Parties modified the usual procedure of Article XXXIII, believing that “as the cir-

Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.”

ANALYTICAL INDEX GATT VOL. 2, *supra* note 66, at 935.

109. *Id.* at 935.

110. *See id.*

111. *Id.* (“In Council discussion, a number of contracting parties considered that given the undertaking of Bangladesh to accept the full obligations of a schedule of tariff bindings identical with that applied before independence. . . it [was not] necessary to set up the usual working party to consider and report on the sustainability of Bangladesh membership.”).

112. General Agreement on Tariffs and Trade [GATT], *Accession of the People’s Republic of Bangladesh*, Nov. 13, 1972, GATT Doc. L/3771, [hereinafter *Accession of Bangladesh*]; *see also* GATT, *Invocation of Paragraph 5 of Article XXVIII*, Jan. 4, 1973, WTO Doc. L/3804, https://www.wto.org/gatt_docs/English/SULPDF/90880011.pdf.

113. *Accession of Bangladesh*, *supra* note 112, at 3.

cumstances in this case were unusual[,] the CONTRACTING PARTIES should be ready to modify the usual procedures in dealing with it.”¹¹⁴

Bangladesh's unusual situation is perhaps most analogous to the UK's situation today.¹¹⁵ The UK will presumably follow GATT and WTO procedures following its secession from the EU and can adopt the EU's Schedule if the UK can invoke Article XXVIII:5. The UK may also be able to expedite this process, as it is already a WTO Member, by simply beginning tariff negotiations under Article XXVIII:1¹¹⁶ when Article XXVI:5(c) is *de facto* applied. Under Article XXVIII, the UK will enter bilateral negotiations with WTO Members who have a “principal or substantial supplying interest in a concession which is to be subject of negotiation and consultation under Article XXVIII.”¹¹⁷ Presuming that not every WTO Member will have a “principal or substantial supplying interest” in the specific concession, the UK may not have to negotiate with as many countries or obtain two-thirds majority approval in order for that specific line provision to be approved.¹¹⁸

The challenges to adopting this procedure are similar to the challenges presented in the second proposal, specifically in relation to Article XXVI:5(c). Negotiations will certainly be difficult and tedious, and the EU could make the negotiating process particularly troublesome due to linger-

114. ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 1025; *see also* Application Received from the Government of Bangladesh, WTO Doc. L/3752 (Oct. 13, 1972) (Communication from Bangladesh seeking accession under Article XXXIII); Summary of the Sixth Meeting, WTO Doc. SR.28/6 81-85 (Nov. 13, 1972).

115. Although academic sources have hinted that Bangladesh was an unusual case, there is limited information explaining why the country was an unusual WTO case.

116. Article XXVIII:1 of the GATT 1947 reads:

“On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the ‘applicant contracting party’) may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the ‘contracting parties primarily concerned’), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concessions, modify or withdraw a concession* included in the appropriate Schedule annexed to this Agreement.”

ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 960.

The Interpretative Note for Article XXVIII from Annex I has been omitted but may be found in ANALYTICAL INDEX GATT VOL 2, *supra* note 66, Article XXVIII.

117. ANALYTICAL INDEX GATT VOL 2, *supra* note 66, at 960.

118. *Id.* at 935.

ing frustration from Brexit. There is also a possibility that, once negotiations commence under Article XXVI, the window for negotiation may trigger an avalanche that subjects everything to negotiation, a dangerous possibility even if Member countries extend a good faith limitation in their negotiations.

Despite these challenges, this model has strong merits. This procedure may be more complex than Bartels' proposal, but the benefits of this procedure's flexibility may outweigh the costs of additional negotiation steps. Agreeing to adopt the EU's Schedule of Concessions with the reservation of Article XXVIII is a suitable compromise to balance the need for trade stability with the need to give the UK flexibility to determine its trade policy. The fact that the UK will formally be undergoing tariff modifications, and not accession as the two other proposals suggest, may significantly strengthen the legitimacy and plausibility of this model. One must bear in mind that the UK's situation is unique, and perhaps the WTO's best strategy is to emulate a previous situation most like the problem today to help legitimize the process: here, following Bangladesh's accession process.

CONCLUSION

The UK's decision to leave the EU has created a unique situation in the WTO: the country's position as both a WTO Member and an EU Member State has resulted in the UK's Schedule of Concessions being fixed by the EU. How the WTO should administratively handle the UK's need to adopt a Schedule of Concessions is unclear.

This Note illustrates three potential routes that the WTO may be able to pursue. The first proposal recommends that the UK adopt a Schedule of Concessions using Article XXVI:5(c) of the GATT 1947 as guidance, in which the UK would submit a new Schedule as Article II of the GATT 1994 and Article XX of the GATS as "other changes" and rectifications to the current EU Schedule. The second proposal suggests that the UK should *de facto* apply GATT Article XXVI:5(c) and request for accession under GATT Article XXXIII, which would thus provide the UK the option not to adopt the EU's Schedule of Concessions in its current state. The third proposal introduces a solution where the UK adopts the EU's Schedule of Concession through a *de facto* application of GATT Article XXVI:5(c), but reserves the right to modify certain provisions within its Schedule of Concession under Article XXVIII:5 of the GATT 1947.

The third proposal—a *de facto* application of Article XXVI:5(c) and tariff modifications under Article XXVIII:5—is the most realistic and strongest path. Having the UK only negotiate certain line items in its Schedule allows the UK to maintain some trade stability while developing

its own trading position. This proposal also formally classifies the UK's adoption of its Schedule as a tariff modification: a recognized, legitimate procedure. Analyzing these three options thus illustrates how important classifying and labeling the UK's adoption of a Schedule of Concessions will be in determining the applicable WTO provision. Despite these speculations, however, how the WTO will actually proceed in handling Britain's unique situation remains a mystery. The UK's future legal status as a trade nation will be undetermined once the country formally begins the process of triggering Article 50 of the Lisbon Treaty and withdrawing its membership from the EU.

